

THE HONORABLE MARSHA J. PECHMAN

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

RICHARD J. ZALAC,

Plaintiff,

v.

CTX MORTGAGE CORPORATION, a
Delaware Corporation; *et al.*

Defendants.

NO. 2:12-cv-01474 MJP

MOTION FOR RECONSIDERATION

NOTE ON MOTION CALENDAR:

March 29, 2013

TO: THE HONORABLE MARSHA J. PECHMAN, U.S. District Court Judge; and
TO: ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

I. MOTION

COMES NOW the Plaintiff, RICHARD J. ZALAC, by and through his attorney, KOVAC & JONES, PLLC, moves the Court to reconsider its Order and Judgment of February 14, 2013, pursuant to *Fed. R. Civ. P. 59*.

II. STATEMENT OF FACTS

On July 11, 2012, the above-captioned matter was filed in King County Superior Court under King County Superior Court Cause No. 12-2-23547-3 KNT, based upon pleading standards common and customary in King County Superior Court for the State of Washington. Plaintiff's Complaint raised predominately issues of State law, including action for

1 Plaintiff's Complaint raised predominately issues of State law, including action for
 2 "irregularities in the proceedings" (wrongful foreclosure), *RCW 61.24 et seq.*, violation of the
 3 Washington State Criminal Profiteering Act (hereinafter "Little RICO"), *RCW 9A.82 et seq.* and
 4 violation of the Washington State Consumer Protection Act (hereinafter "WCPA"), *RCW 19.86,*
 5 *et seq.* As a basis for alleging a *per se* violation of the WCPA, Plaintiff raised a claim for
 6 violation of the Fair Debt Collection Practices Act (hereinafter "FDCPA"), *15 USC 1962, et seq*
 7 and Real Estate Settlement Procedures Act (hereinafter "RESPA"), *12 USC § 2605 (e).* A true
 8 and correct copy of Plaintiff's Summons and Complaint is attached to Verification of State
 9 Court Records, on file herein. (Dkt. No.3, Exhibit "A"). Many of these Washington state claims
 10 have been strengthened by the Washington Supreme Court's decision in *Schroeder v. Excelsior*
 11 *Management Group, LLC*, (Case No. 86433-1 and 86710-1) filed February 28, 2013. A true and
 12 correct copy of this decision is attached hereto as ***Exhibit "I"***.

13 This matter was removed from King County Superior Court to the Federal District Court
 14 for the Western District of Washington on August 29, 2012, pursuant to *28 USC 1332, 1441 and*
 15 *1446.*

16 On February 14, 2013, the Court dismissed Plaintiff's Complaint, pursuant to *Fed. R.*
 17 *Civ. P. 12(b)(6).* See Dkt. 35. Although the Court found Plaintiff's Complaint wanting, the
 18 Court did not provide Plaintiff leave to amend his Complaint to comply with the pleading
 19 standards common and customary in the U.S. District Court for the Western District of
 20 Washington, under *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007) and *Ashcroft v. Iqbal*,
 129 S.Ct. 1937, 1949 (2009).

21 Now, Plaintiff seeks reconsideration of the Court's Order of Dismissal of February 14,
 22 2013, pursuant to *Fed R. Civ. P. 59.*

III. STATEMENT OF LAW AND ANALYSIS

A. Re-allegation of Statement of Facts and Legal Authority.

For purposes of Plaintiff's Motion for Reconsideration, Plaintiff re-alleges and incorporates herein by this reference each and every fact and legal authority submitted and argued in its Response to Defendants' Motion to Dismiss of November 29, 2012, as though fully set forth herein. See Dkt. 24.

B. Neither MERS nor Chase was ever the true and lawful owner of the Note.

Critical to this Court's analysis of the facts is its apparent determination that MERS was a holder of Plaintiff's Note. In its Order of February 14, 2013, the Court states "[h]e [Plaintiff] executed a promissory note, listing CTX as lender and Mortgage Electronic Recording System, Inc ("MERS") as the beneficiary." The Court goes on to state, "[r]oughly four years later, MERS assigned its right as beneficiary under Plaintiff's note to Chase." Neither of these factual assertions are true and suggests a fundamental misunderstanding of the transaction that is at issue and now before the Court.

The Court has apparently confuses the Note with the Deed of Trust. MERS does not appear anywhere in the subject Note. See Dkt. 1, Exhibit A to Exhibit A. MERS only appears in the Deed of Trust, as nominee of the lender. See Dkt. 1, Exhibit B to Exhibit A. This much is conceded by Defendants'.¹ See Dkt. 17, pages 1-2. If MERS was never named in the subject

¹ Defendants state in their Motion that "Plaintiff executed a Deed of Trust" naming "MERS as beneficiary." Defendants do not suggest the Note referred to MERS. Notes do not have "beneficiaries" - Deeds of Trust do. Defendants state that "Countrywide notified Plaintiff that servicing of his loan was being transferred from CTX Mortgage to Countrywide", not suggesting a transfer of the Note itself. Defendants state that "Countrywide notified Plaintiff that the servicing of his loan was being transferred to Chase Home Finance LLC as of November 1, 2006", not suggesting transfer of the Note itself. It is abundantly clear the Court has confused the Note with the Deed of Trust, the rights associated with these instruments and the facts set forth in the party's pleadings.

1 Note and never held the subject Note at any time relevant to this cause of action, it could not
2 assign the Note or any interest therein. In fact, the Assignment of Deed of Trust executed by
3 MERS on February 3, 2012, makes no reference to the subject Note. See Dkt. 1, Exhibit H to
4 Exhibit A. Accordingly, the Court erred in suggesting that MERS ever assigned the Note or that
5 MERS or Chase ever held the subject Note. There is simply no evidence to support that factual
6 assertion by the Court.

7 Furthermore, if MERS was not a proper or eligible beneficiary under *RCW 61.24, et seq.*,
8 it had no right to assign the beneficial interest in the Deed of Trust. *Bain v. Metropolitan*
9 *Mortgage, et al.*, 175 Wn.2d 83, 111, 285 P.3d 34 (2012) (hereinafter "*Bain*").

10 Finally, Chase never bought or sold anything. The record of transfer of the Note from
11 CTX Mortgage to Fannie Mae has not been revealed, so it is impossible to trace the assignment
12 of the Note. However, the record is relatively clear on one issue, at all times relevant to this
13 cause of action, Countrywide and Chase were mere servicers of the subject loan, acting at the
14 behest of an undisclosed principal. CTX and Countrywide merely assigned "servicing rights" to
15 the Note – not the Note itself, in contradiction to the Court's statement of Background. Dkt. 35.
16 This is also conceded by Defendants. See Dkt. 17, pages 1-2. Transfer of servicing rights is not
17 the equivalent of an assignment of the Note.

18 If Countrywide and Chase were mere servicers of the obligation and neither MERS nor
19 Chase ever held and owned the subject Note, both being necessary requisites to prosecute a non-
20 judicial foreclosure, no Defendant named herein were valid "beneficiaries" within the terms of
21 *RCW 61.24 et seq.* See *RCW 61.24.005* and *RCW 61.24.030(7)* and (8).

22 Given the Court's apparent confusion concerning the instruments at issue herein, the
nature of the assignment of rights to various Defendants and the facts presented by the parties to

1 the present controversy, it is inconceivable the Court could reach the proper conclusions of law.
 2 Accordingly, Plaintiff respectfully requests the Court reconsider *in toto* its dismissal of
 3 Plaintiff's claims, including the arguments presented in the parties pleadings on Motion to
 4 Dismiss, in view of the facts that were actually presented through the documents attached to
 5 Plaintiff's Complaint and the claims asserted therein.

6 **C. Plaintiff is entitled to leave of Court to amend his Complaint.**

7 As noted above, Plaintiff's Complaint was written on pleading standards common and
 8 customary in King County Superior Court for the State of Washington. Washington has
 9 specifically rejected the more stringent pleading practices outlined in *Bell Atl. Corp. v. Twombly*,
 10 *supra.* and *Ashcroft v. Iqbal, supra.* See *McCurry v. Chevy Chase Bank*, 169 Wn.2d 96, 233
 11 P.3d 861 (2010).

12 This matter was removed from King County Superior Court on or about August 29,
 13 2012. Since then, no amendment to Plaintiff's Complaint has been made. Moreover, no
 14 discovery has been permitted.

15 In the 9th Circuit, courts are encouraged to grant leave to amend in the event that the trial
 16 court finds plaintiff has not met the pleading requirement of *Bell Atl. Corp. v. Twombly, supra.*
 17 and *Ashcroft v. Iqbal, supra*, even if no request to amend has been made, unless the court
 18 determines that the pleading could not possibly be cured by the allegation of other facts. *Breier*
 19 *v. Northern California Bowling Proprietor's Assoc.*, 316 F.2d 787 (9th Cir. 1962); *Doe v. United*
 20 *States*, 58 F.3d 494, 497 (9th Cir. 1995); *Straight v. Approved Federal Savings Bank*, 2005 WL
 21 1288091 (W.D. Wash 2005). As noted in the case of *Breier v. Northern California Bowling*
 22 *Proprietor's Assoc, supra*, at page 789: "Neither the filing nor granting of such a motion before

1 the present controversy, it is inconceivable the Court could reach the proper conclusions of law.
 2 Accordingly, Plaintiff respectfully requests the Court reconsider *in toto* its dismissal of
 3 Plaintiff's claims, including the arguments presented in the parties pleadings on Motion to
 4 Dismiss, in view of the facts that were actually presented through the documents attached to
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 18 determines that the pleading could not possibly be cured by the allegation of other facts. *Breier*
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 21 1288091 (W.D. Wash 2005). As noted in the case of *Breier v. Northern California Bowling*
 22 *Proprietor's Assoc*, *supra*, at page 789: "Neither the filing nor granting of such a motion before

1 answer terminates the right to amend; an order of dismissal denying leave to amend at that stage
 2 is improper, and a motion for leave to amend (though unnecessary) must be granted if filed.”

3 Here, the Court has made no finding that Plaintiff's Complaint cannot possibly be cured
 4 to comply with the more stringent pleading requirements of the federal courts. Accordingly,
 5 Plaintiff should be entitled leave of Court to amend his pleadings, rather than suffer the loss of
 6 due process rights to have his claims heard before a court of competent jurisdiction. Justice
 7 demands no less - particularly in view of the Court's apparent confusion regarding the
 8 instruments at issue herein, the nature of the assignment of rights to various Defendants and the
 9 facts presented by the parties to the present controversy.

10 IV. CONCLUSION

11 Based upon the foregoing, Plaintiff requests the Court reconsider its Order of February
 12 14, 2013 to reexamine the facts and the instruments attached to Plaintiff's Complaint. In
 13 addition, Plaintiff requests the Court revisit the arguments submitted in support of and in
 14 opposition to Defendants' Motion to Dismiss, based on a comprehensive reevaluation of the
 15 subject transaction. If, at the end of its reconsideration the Court still concludes that Plaintiff's
 16 Complaint does not satisfy the requirements of *Bell Atl. Corp. v. Twombly, supra.* and *Ashcroft*
 17 *v. Iqbal, supra.*, Plaintiff requests/moves the Court for leave to amend his Complaint to avoid
 18 loss of his due process rights.

19 **RESPECTFULLY SUBMITTED** this 4th day of March, 2013.

20 **KOVAC & JONES, PLLC**

21 
 22 Richard Llewelyn Jones, WSBA # 12904
 Attorney for Plaintiff

CERTIFICATE OF SERVICE

I hereby declare under penalty of perjury of the laws of the State of Washington that on this 5th day of March, 2013, I caused to be delivered a copy of the foregoing **MOTION FOR RECONSIDERATION** to the following in the manner indicated:


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DATED this 5th day of March, 2013.


Dan Williams, Paralegal